

1952

Vaughn L. Warr v. The Van Kleeck-Bacon Investment Company et al : Brief of Plaintiffs and Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

VAUGHN L. WARR, MARY ILE-
ENE WARR McKOWAN, ETHEL
WARR REED, KATHERINE
WARR HAMILTON and EMMA
WARR HAMILTON,

Plaintiffs and Respondents,

vs.

THE VAN KLEECK-BACON IN-
VESTMENT COMPANY and THE
VAN KLEECK MORTGAGE COM-
PANY,

Defendants and Appellants,

JAY LARSEN,

Appellant and Intervener.

No. 7872

Brief of Plaintiffs and Respondents

FILED

SEP 25 1952

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PANY,

Defendants and Appellants,

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Brief of Plaintiffs and Respondents

I

STATEMENT OF FACTS

Early in the year 1920 The Van Kleeck Mortgage Com-
pany, a Colorado corporation, appointed an agent in the State
of Utah for the purpose of soliciting loans. The company

at the time, however, did not qualify to do business in the State of Utah or appoint any process agent. On April 22, 1920 The Van Kleeck Mortgage Company, while still not qualified to do business in the State of Utah, made a loan to Joseph F. Warr and Elizabeth Warr, his wife, in the amount of \$2500.00 and took as security therefore a mortgage on the property, which is the subject of this law suit. On the 19th day of April, 1921 the Warrs executed a Warranty Deed on the property in favor of The Van Kleeck-Bacon Investment Company, a sister corporation of the Mortgage Company, also a Colorado corporation. The Investment Company never acquired any interest in the note or mortgage, nor did it pay to the Mortgage Company any consideration for any interest in the property covered by the mortgage, nor did the Mortgage Company ever attempt or purport to transfer to the Investment Company any interest which the Mortgage Company may have had in said property by reason of the mortgage. Likewise, the Investment Company paid no consideration to the Warrs for the deed.

Coincidentally with the signing of the deed to the Warrs, The Van Kleeck-Bacon Investment Company executed an agreement to reconvey the property to the Warrs upon the payment to The Van Kleeck-Bacon Investment Company of the sum of \$3500.00. The deed itself was recorded. The reconveyance agreement was not recorded—in fact, it contained a provision that if it were recorded it should become null and void.

The Van Kleeck Mortgage Company qualified to do business in the State of Utah on the 2nd day of May, 1921.

The charters of both companies were revoked by the State of Utah for the non-payment of license fees on the 20th day of April, 1936, and the companies were not reinstated until March, 1951. By the terms of the corporate charters in the office of the Secretary of State, the corporate life of both companies has long since expired. No amendments extending the corporate life of either of these companies has ever been filed with the Secretary of State of the State of Utah.

On March 3, 1938 the Mortgage Company, as grantor, executed a contract of sale to the surface rights of said property to one Jay Larsen. In 1942 the Investment Company executed a Warranty Deed to the surface to Jay Larsen. In 1951 the Investment Company executed a lease on the mineral rights in favor of the Carter Oil Company for the consideration of \$75,000.00.

Between 1921 and 1951 the two companies intermittently had process agents appointed in the state, but during long periods of time there were no process agents at all. In March of 1951 these two companies jointly wrote to one Don Barr, a resident of Vernal, Utah, asking if he would serve as process agent. Barr wrote back that he would so serve. The companies thereupon informed him that he was the process agent and filed the necessary papers with the Secretary of State. However, they gave Don Barr no instructions of any nature whatsoever regarding his duties as process agent, nor did they subsequently communicate with him regarding what he should do in the event process was served upon him.

On the 31st day of July, 1951, the plaintiffs served sum-

mons in this action on Don Barr as process agent for the defendant companies (R. 4), having previously on the 27th day of June, 1951, filed the Complaint (R.3), and recorded the Lis Pendens. No answer was made in the time provided by law. Default was entered August 21, 1951 (R. 38), and on the 31st day of August, 1951, the plaintiffs adduced evidence and took Default Judgment (R. 5) in the action quieting title in them to the property as against The Van Kleeck Mortgage Company and The Van Kleeck-Bacon Investment Company.

On the 20th day of November, 1951, the defendants, The Van Kleeck Mortgage Company and The Van Kleeck-Bacon Investment Company, filed a motion to set aside the default judgment (R. 9) on the grounds "that the said entry of default and said default judgment were entered and taken against the said defendants through and by reason of their mistake, inadvertence, surprise or excusable neglect." This matter was argued before the Court on the 14th day of December, 1951 and on the 26th day of April, 1952 the Court entered its ruling denying the motion to set aside the default judgment (R. 31), which ruling was docketed on the 13th day of May, 1952. On the 23rd day of May, 1952 the defendants filed another motion to set aside the default judgment (R. 32) on the grounds that there was a misjoinder of parties in that the plaintiffs had failed to make the owner of the surface rights, Jay Larsen, a party defendant and also that they had failed to make Carter Oil Company a party defendant. On the same day, Jay Larsen filed a motion to set aside the default judgment and for permission to intervene in the action (R.

39). On the following day, May 24, 1952, The Van Kleeck-Bacon Investment Company filed a motion to have the court reconsider and set aside its ruling (R. 44) denying the defendants' motion to set aside the default judgment on the grounds of mistake, inadvertence, surprise or excusable neglect. These matters were argued before the Court. During argument in open court, plaintiffs' counsel offered to give to Jay Larsen a Quit Claim Deed from plaintiffs to the surface rights of all of the property concerned in this action (R. 56). Larsen was not present, nor was his attorney. He was being there represented by the same attorney representing the Van Kleeck companies, which attorney, on behalf of Larsen, rejected the offer of a Quit Claim Deed. All of these motions were denied (R. 55) and from this denial the appeal now before this Court has been taken. The particular facts will be more fully discussed in connection with the points to which applicable.

II

STATEMENT OF POINTS

I

THE DEFAULT SHOULD NOT BE SET ASIDE UNDER THE ORIGINAL MOTION.

II

THE MOTION TO SET ASIDE THE DEFAULT FOR NON-JOINDER OF PARTIES SHOULD BE DENIED.

III

JAY LARSEN SHOULD NOT BE PERMITTED TO INTERVENE.

IV

THE POSITION OF CARTER OIL COMPANY.

III

ARGUMENT

THE DEFAULT SHOULD NOT BE SET ASIDE UNDER THE ORIGINAL MOTION.

(a) The Default Did Not Result From Surprise, Inadvertence or Excusable Neglect.

The original motion filed by the defendants and all of the argument directed thereto was based upon the ground that the default of the defendant resulted from surprise, inadvertence or excusable neglect, and therefore should be set aside under the provisions of Rule 55 (c) and Rule 60 (b) Utah Rules of Civil Procedure. The defendants appear to have practically abandoned this argument, devoting only a few pages of their voluminous Brief to this matter. To insure that this Court will have no doubt that the court below correctly denied defendants' said motions, we propose to discuss the matter fully.

The evidence in the record shows that the Summons was properly served upon the process agent at Vernal, Utah,

which the defendants had designated, Mr. Don Barr. Barr in his affidavit states that he had never received any instructions from the defendants as to his duties as process agent and that at the time he was served, the fact that he was their process agent had actually slipped his mind. Our statutes specifically provide that answer to summons shall be made in 20 days. If the default in this case were set aside on the showing made, it would mean that in every case, and certainly in every case concerning a non-resident corporation, the time to answer would not be 20 days as the rule says, but 110 days—20 days plus the 90 days time in which to move to set aside a default judgment. Such is certainly not the law.

One of the earliest cases in Utah touching this point concerns a non-resident corporation and is very much in line with the case now before the Court. This is the case of *Walker Bros. v. Continental Insurance Company of N. Y.*, 2 Utah 331. In the Walker case, as in this case, summons was served on the agent for a non-resident corporation. The agent in the Walker case held the summons and did nothing about it until it was too late for the company to answer. The evidence showed in the Walker case, as it shows in this case, that the company had never informed its resident agent as to the procedure to be followed if a summons were served. In the Walker case, as in this case, the non-resident agent apparently never did read the summons to determine just what its nature was. The lower court refused to set aside the default judgment and the appellate court upheld the decision of the lower court. In discussing the law, the court stated:

“There was no abuse of discretion, and the decision

is fully justified on the ground of negligence in the local agent, in the general agent, and in the attorney of appellant.

"He mailed the papers to New York City, knowing an answer could not be drawn and received by mail within the remaining nine days.

"It does not appear that he wrote, or that he informed the appellant when service was made; or whether he would or would not act in the matter; or that he even read the summons; or knew when the answer would be due."

The Court further stated:

"The appellant urges that its agents made a mistake in not deeming it his duty to protect appellant from default and judgment, and made an inadvertence in not promptly taking steps to prevent default and notifying appellant by telegraph. There is nothing in the affidavits to show that the agent had any instructions or authority from the appellant to protect its rights in the manner specified, and he himself swears that he was not authorized to employ counsel, and 'could only submit the papers to the company and await their instructions.' He does not, therefore, appear to have made any mistake or inadvertence. It was the mistake and inadvertence of the company, in not giving him authority to act for the corporation in such cases. But the mistake and inadvertence are not such as can be relieved against."

Although this case is an old one, it is still very much in line with the weight of authority and has never been modified by the Supreme Court of Utah.

The only Utah case upon which defendants rely on this point is the case of *Utah Commercial Bank v. Trumbow*, 17 Utah 199, which is so far different from this case on its facts that it has no persuasive value. In the *Trumbow* case, the default resulted from the fact that a notice given went astray in the mails, and the *Trumbow* case holds, in line with the great weight of authority, that the defendant is not chargeable with the failure of the United States mail and that failure to answer resulting from failure of the mail service is excusable neglect. In this case if the process agent, Barr, had actually mailed the papers to the defendants and the mails had failed to deliver them, the case would have been in line with the *Trumbow* case. Such, however, is not the fact. Barr did not even remember that he was process agent for the defendants and paid no attention to the summons served upon him.

The California statute covering the setting aside of default judgments is very similar to ours and has been construed by the courts of that state in numerous cases. The following excerpt from the California Appellate Court in the case of *Elms v. Elms*, 164 P. (2d) 936, indicates the attitude of the California courts where the mistake or negligence is deemed inexcusable:

“To warrant relief under section 473 a litigant’s neglect must have been such as might have been the act of a reasonably prudent person under the same circumstances. The inadvertence contemplated by the statute does not mean mere inadvertence in the abstract. If it is wholly inexcusable it does not justify relief. *Freeman on Judgments*, 4th Ed., Vol. 1, p. 482; *Shearman v. Jorgensen*, 106 Cal. 483, 485, 39 P. 863.

It is the duty of every party desiring to resist an action or to participate in a judicial proceeding to take timely and adequate steps to retain counsel or to act in his own person to avoid an undesirable judgment. Unless in arranging for his defense he shows that he has exercised such reasonable diligence as a man of ordinary prudence usually bestows upon important business his motion for relief under section 473 will be denied. Freeman, 483, 5th Ed. Courts neither act as guardians for incompetent parties nor for those who are grossly careless of their own affairs. All must be governed by the rules in force, universally applied according to the showing made. Gillingham v. Lawrence, 11 Cal. App., 231, 232, 105 P. 584. The law frowns upon setting aside default judgments resulting from inexcusable neglect of the complainant. The only occasion for the application of Section 473 is where a party is unexpectedly placed in a situation to his injury without fault or negligence of his own and against which ordinary neglect will warrant judicial relief unless it may reasonably be classified as of the excusable variety upon a sufficient showing. Hughes v. Wright, 64 Cal. App. 2d 897, 149 P. (2d) 392."

In all of the following California cases, the trial court actually set aside the default judgment and the appellate court held that the trial court had abused its discretion in so doing and reinstated the default judgments. In Sharman v. Jorgensen, 39 Pac. 863, the attorney thought he had filed the Answer, but inadvertently did not do so. In Durbow v. Chesley, 141 P. 631, the defendant's attorney failed to file an appearance due to a mistaken understanding that the action was to be consolidated with other actions. In Ross v. San Diego Glazed Cement Pipe Co., 194 Pac. 1059, the attorney received the service of a cross-complaint and instructed his

stenographer to place it in the files, but no further action was taken.

In the following California cases, the lower court refused to set aside the default judgment and was sustained by the appellate court. In the case of *Shay v. Chicago Clock Co.*, 44 Pac. 237, the court stated the facts as follows:

“The president read the papers that day, and observed their date, but, without making any inquiry as to the time when they were served, kept them in his possession until after the default had been entered. He stated, at the hearing of the motion, that he did not send for his attorney, or send the papers to him, but kept them, thinking that his attorney would be in every day, and therefore waited until he should come, and that, when he did see him, the default had been entered.”

In *Coleman v. Rankin*, 37 Calif. 247, the defendant received a copy of the summons while in attendance as a witness in court and placed it in his hat and lost it. In *Williams v. Cummings*, 30 Pac. 762, the attorney incorrectly marked the date of service of summons and was late in filing his answer.

In the case of *Cleek v. Virginia Gold Mining & Milling Company*, 122 P. (2d) 232, the Supreme Court of the State of Idaho set aside an order of the lower court vacating a default judgment using the following language:

“While the granting or refusing to grant a motion to vacate a judgment and set aside a default, where right to relief is based on the claim that they have been permitted to be taken and entered through mis-

take, inadvertence, surprise or excusable neglect, is a matter which rests largely in the discretion of the trial judge, reference is always had in stating that rule to a sound, judicial reviewable discretion, in the exercise of which courts must bear in mind a judgment is property of which the owner must not be deprived without due process of law, and the mistake or neglect, to be sufficient, must be such as may be expected on the part of a reasonably prudent person situated as was the party against whom the judgment was entered. *Kynaston v. Thorpe*, 29 Idaho 302, 158 P. 792; *Valley State Bank v. Post Falls, etc.*, 29 Idaho 587, 161 P. 242; *Green v. Craney*, 32 Idaho 338, 182 P. 582." See, also, *Dormer v. Stone*, 27 Idaho 279, 149 P. 505; *Nelson v. McGoldrick Lumber Co.*, 30 Idaho 451, 165 P. 1125; *Savage v. Stokes*, 54 Idaho 109, 28 P. (2d) 900; *Voellmack v. Northwestern M. L. Ins. Co.*, 60 Idaho 412, 92 P. (2d) 1076.

Again the California Courts, in the case of *Weinberger v. Manning*, 123 P. (2d) 531, held that the burden of proof of establishing that neglect was excusable was on the defendant. In refusing to set aside a default judgment, the court stated:

"The first question for determination under the cited section is whether or not there was a mistake, inadvertence, surprise or excusable neglect on the part of defendant. If there was not then she is not entitled to relief, notwithstanding any showing of merits 'in support of her motion.' *Bond v. Karma-Ajax Consol. Min Co.*, 15 Cal. App. 469, 472, 115 P. 254. The burden of proof in such a matter is upon the defendant and she was required to establish her claim of excusable neglect by a preponderance of the evidence. *Bruskey v. Bruskey*, 4 Cal. App. (2d) 472, 41 P. (2d) 203. While courts are generous in reliev-

ing litigants of their defaults resulting from inadvertence or excusable neglect yet they are not required to act as guardians for persons who are grossly careless as to their own affairs. *Gillingham v. Lawrence*, 11 Cal. App. 231, 233; 105 P. 584. All persons in possession of their normal facilities, capable of engaging in business transactions must conform with, and be guided by, the rules and regulations of legal procedure. *Ibid.* While the decision upon a motion to open a default is primarily within the discretion of the trial court, at the same time such discretion may not be exercised arbitrarily; it must be an 'impartial discretion guided and controlled in its exercise by fixed legal principles.' *Brill v. Fox*, 211 Cal. 739, 297 P. 25, 26."

The following enlightening language is found in the case of *Bickerstaff v. Harmonica Fire Ins. Co.*, 133 S.W. 2d 890 @ 892:

"In the case last cited the court said: 'The statute to vacate judgments by this proceeding is in derogation, not only of the common law, but of the very important policy of holding judgments final after the close of the term. Citizens must have some confidence in the judgments of our official tribunals, as settlements of their controversies, and there should be some end of them. Unless a case be clearly within the spirit and policy of the act, the judgment should not be disturbed'."

In the case of *Bond v. W. T. Congleton Co.*, 129 S.W. 2d 570 @ 573, the court stated:

"However, this liberal attitude has never been extended to the point of declaring that a party is entitled to have a default judgment set aside as a matter

of right. It is only when he shows a reasonable excuse and establishes that he has not been guilty of unreasonable delay or neglect that the discretion of the trial court should be exercised in setting aside a default judgment and permitting defense to be made."

In the case of *Lynch v. Arizona Enterprise Mining Co.*, 179 Pac. 956 @ 957, the service was made on a non-resident agent who failed to notify his principal. Default was taken and the lower court set the default aside. The supreme court of Arizona reversed the lower court and reinstated the default judgment using the following language:

"Can the negligence of the statutory agent in not notifying the defendant of the pendency of the suit because 'he did not know the address of the company' be considered 'excusable neglect'? We think not. It must be conceded that it was the duty of the agent to promptly forward the summons to the proper officers of the company. There is no showing that he made any effort to ascertain the address of any of the defendant's officers. Nothing of that nature is disclosed. It appears that the principal works of the company are situated at or near Boise, in the adjoining county, to the one in which the agent resides. Furthermore, the statute requires that the articles of incorporation organized under the laws of this state shall contain 'the names, residences, post office addresses of the corporators, the name of the corporation, and its principal place of business.' Civ. Code 1913, par. 2100. These articles are required to be filed in the office of the Arizona Corporation Commission. It is too plain to be questioned that, if the agent had made any reasonable effort to discover the address of any officer of the company, he would have succeeded, and it must be held that he was culpably negligent in not

doing so, and that his negligence was the defendant's negligence."

In the recent case of *Postal Benefit Ins. Co. v. Johnson*, 165 Pac. (2d) 173, the Arizona courts went even further. In that case, summons was served on the corporation commission of Arizona, which by statute was made the process agent for the non-resident corporation in question. The corporation commission failed to notify the defendant of the pendency of the suit and a default judgment was taken. The lower court refused to set the default aside and the Supreme Court sustained the decision of the lower court. The language of the Arizona Supreme Court is as follows:

"We are committed to the rule that where service had been made on a duly appointed statutory agent, and the agent failed to notify his principal, through mere carelessness, that such a showing does not constitute 'excusable neglect but was indeed inexcusable neglect.' *Lynch v. Arizona Enterprise Min. Co.*, 20 Ariz. 250, 179 P. 956. We believe the majority of the cases support this view. 31 Am. Jur. 287, Sec. 747, Judgments. If the statutory agent here was one by appointment, rather than by law, we would be impelled to follow the *Lynch* case. We see no reason to adopt a different rule where the agent has been made so by law rather than by appointment. Under the law, the defendant actually appointed each member of the commission as its agent. Unless, therefore, the showing made disclosed that the agents were excusable in failing to advise defendant of the summons, the court properly denied the application to set aside the judgment. The record is barren of any legal excuse on the part of the commission. It appears that the summons was placed in the files of the commission,

and nothing further done about it. This is no justifiable excuse or neglect. *Lynch v. Arizona Enterprise Co.*, supra; *Gutierrez v. Romero*, 24 Ariz. 382, 210 P. 470; *Garden Dev. Co. v. Carlow*, 33 Ariz. 232, 263, P. 623, 625; *Missouri, Kansas & Texas R. Co. v. Ellis*, 53 Okl. 264, 156 P. 226, L.R.A. 1916E, 100; *Gordon v. Harbolt*, Cal. App. 280 P. 701; *Larson v. Zabroski*, 21 Wash. (2d) 572, 152, P. 2d 154 rehearing 155 P. 2d 184.”

In the case of *Penn Central Light & Power Co. v. Central Eastern Power Co.*, 171 A. 332 @ 335, the defendant failed to answer and cited the failure of its process agent to bring the service of summons to its attention as a basis to set aside the default judgment taken. The court refused to set aside the default judgment and quoted in support of its refusal *Freeman on Judgments*. The language of the Pennsylvania Court is as follows:

“The defendant is a citizen of the State of Delaware. The statute requires it to have a resident agent upon whom process may be served. It appointed such agent. Service upon the resident agent is as complete and valid as if the service had been made upon the President or other head officer.

“To hold otherwise would be to destroy the effect and meaning of section 48 of the Corporation Law (as amended by 34 Del. Laws, c. 112, Sec. 12).

“It would be the same, if the defendant were a foreign corporation and service of process had been made upon its statutory agent. 1 *Freeman on Judgments*, Sec. 346.”

In *Freeman on Judgments*, Vol. 3, Sec. 1204, in treating of equitable relief, it is said:

"Consequently even an inequitable judgment will not be set aside nor will its enforcement be enjoined where it was the result of the complaining party's fault or inexcusable neglect. To entitle a party to relief, he must not only show the fraud, mistake or other ground for equitable interference, but it must appear that he was not negligent in failing to discover the real facts in time to prevent the judgment. This principle of diligence is as applicable to a party's agent and representative in the action as to the party himself. Thus, a judgment against an infant will not be set aside merely because of the neglect of his guardian ad litem where there was no fraudulent or collusive act by the plaintiff. The same is true with respect to the neglect of a trustee of a school district. And the failure of a corporate agent upon whom service was legally made to inform the executive officers of the defendant of the fact, because of his unwarranted assumption that the service was ineffective, is negligence which defeats relief."

The same rule prevails in the Federal Court. In *Traveler's Protective Assn. v. Gilbert* (C.C.A.) 11 F. 269, 275, 55 L.R.A. 538, summons was served on the secretary of the corporation. The secretary of the corporation informed the marshal that he, the secretary, was not the proper person to be served, but that the marshal should serve the President of the association. The secretary assumed that he, the marshal, would follow his directions. The marshal did no such thing, but filed the return on the basis of the service on the secretary. Default was taken. The appellate court refused to disturb the finding of the lower court that the default judgment should not be vacated. The following is the language of the appellate court:

"We are also of the opinion that the misapprehension claimed to exist on the part of Secretary Bass was not such as justified him in not informing the proper executive officers of the pendency of the suit. Even if he did think the Marshal would take his advice, and serve some other person, he, with the copy of the summons in his possession, was not justified in the misapprehension claimed for him. He was clearly negligent in not apprising his superior officers of the service as made, and the association, being responsible for his negligence, cannot resort to a court of equity for relief."

In the case of *S. B. Reese Lumber Co. v. Licking Coal & Lumber Co.*, 161 SW 1124 @ 1126, summons was served on the statutory agent who failed to notify his principal. That court also refused to set aside the default judgment. The court stated in its opinion:

"Though Cook's denial that such advice was given to him by Nesbitt or that he made the reply attributed to him by the latter; and that of appellant's vice-president and manager, S. B. Reese, that notice of the service of the summons was ever given appellant by Cook, be accepted as the truth of the matter, it would merely show that Cook was negligent in failing to inform appellant of the service of the summons upon him, and, this being so, appellant cannot rely upon the negligence of its agent as ground for vacating the judgment rendered against it after being properly summoned in this action. In such a state of case the negligent of th agent is imputed to the principal, and is, therefore, the negligence of the latter. In other words, the absence of actual knowledge by appellant of the service of the summons upon its agent of the pendency of the action, though it may have prevented it from making defense to the ac-

tion, was not such an unavoidable casualty or misfortune in the meaning of sub-section 7, Sec. 518 Civil Code, as entitles it to a vacation of the judgment or a new trial. *Beasley et al v. Furr*, 154 Ky. 286, 157 S.W. 10."

In the case of *San Antonio Paper Co. v. Morgan*, 53 S.W. (2d) 651 @ 653, the appellate court again upheld the discretion of the trial court in refusing to set aside a default judgment. The following excerpt is taken from the appellate court's decision:

"The question of setting aside a default judgment is a matter within the discretion of the trial court, and, unless that discretion has been clearly abused, which is not the case here, an appellate court is not authorized to disturb the judgment. It is also settled law that, where one seeks to set aside a default judgment because of failure to answer and defend the suit, he must show that neither he nor his agents were negligent in that regard, and that, where defendant fails to show a reasonable excuse for not answering the suit in time, it is immaterial that he alleges a meritorious defense thereto. *Hooser v. Wolfe* (Tex. Civ. App.) 30 S.W. (2d) 728; *Homuth v. Williams* (Tex. Civ. App.) 42 S.W. (2d) 1048, and cases there cited. The failure of Newton to inform appellant, his employer, of the service of citation upon him until August 28, 1931, and in telling appellant that he was served on that date, was negligence, and showed no reasonable excuse for not answering the suit in time, except an excuse based upon the negligence of appellant's agent and with which negligence appellant alone is charged."

The case of *Wheat v. McNeil*, 295 P. 102, although it

does not go directly to the negligence of a process agent, does go to the question of whether or not mere mistake on the part of a person receiving the summons is sufficient grounds upon which to set aside a default judgment. In that case, the person receiving the summons failed to take any action because of the fact that he believed that it had to be served by a peace officer, when in fact it was served by a private individual. Default was taken and the Court refused to set it aside. In upholding this decision the appellate court stated:

“As to the mistake, advertence, etc., alleged in the complaint, and the fraud in relation thereto, the following excerpt from the complaint may be recited as a complete answer to any grounds for relief: The complaint uses the following language: ‘That the palintiff was at such time (referring to the service of summons), of the opinion and belief that such summons and complaint, in order to be legal, had to be served upon him by a sheriff or an officer of the law; that at such time the plaintiff was not of the opinion and belief that he had been actually and legally served with a copy of the summons and complaint in said action, or in said action at all; that because of the aforesaid facts the plaintiff, through mistake, inadvertence, surprise or excusable neglect, failed to employ the services of an attorney, and refrained from making any legal defense to such action, and suffered a default to be taken therein and judgment rendered against him’. This, of course, constitutes no excuse whatever. By his own pleading the appellant in this case shows that the service of summons in the personal injury action, that is, the action where judgment was taken by default against the appellant, was had in entire accord with the provisions of sections 410 and 411 of the Code of Civil Procedure.”

A similar ruling was pronounced in the North Dakota case of *Foley v. Davis*, 211 N W 818, where the defendant failed to answer the summons because he believed it should have been signed by the Clerk of the Court instead of by an attorney. The default was granted. A motion was filed to set aside the default which was denied, and the appellate court upheld the denial.

Additional cases where summons was served on a process agent who failed to notify his principal and where the courts refused to set aside the default judgment taken are:

George O. Richards Co. v. Scott (an Okla. case),
251 Pac. 482.

Bradshaw v. Des Moines Ins. Co. (an Iowa case),
134 N W 628.

"18-8-5 Disability of Noncomplying Foreign Corporation.

(b) *The defendants have no meritorious defense.*

In order to have a default judgment set aside in addition to showing that the same was taken as a result of surprise, inadvertence or excusable neglect, it is necessary for the person moving to set aside the judgment also to show that he has a meritorious defense. In the court below, the defendants took the position that if the answer itself stated a defense, this requirement of the statute was met. While this may have been true under the old rules of pleading which required great particularity, it certainly cannot be true under our present Rules of Civil Procedure which allow the complaint and the

answer to state the position of the party in a very general way and then provide that it may be supplemented by depositions, written interrogatories and demands for admission. All of these supplement the pleadings. It is the position of the plaintiffs that whether there is a meritorious defense depends upon the state of the record at the time of the hearing. The plaintiffs in this case took the depositions of certain officers of the defendant companies to supplement and explain the allegations in the defendants' answer. These depositions were before the lower court at the time this motion was argued and therefore should have been, and undoubtedly were, considered by the court in connection with the argument. The record is at the present time in such a state that if the default judgment were set aside, the plaintiffs could go into court and move, and be entitled to, a summary judgment on the pleadings. Certainly when the record is in that condition, a meritorious defense is not shown.

Before discussing further the law of the case as it applies to the merits, plaintiffs would like to call the attention of the court to certain statements made by counsel for the defense in their brief. Counsel stated that it would not be equitable to set aside the default judgment because if the default judgment is allowed to stand, the defendants would lose the money they advanced on the mortgage. This is not a good defense as it will hereafter be pointed out because of the fact that the mortgage has been released and was void in the first place. However, the court might understandably be somewhat influenced if they felt that the defendants might sustain an out-of-pocket loss if the judgment were sustained. That is a

matter of equity. It is also a well established rule that one who seeks equity must do equity and that one coming into a court of equity must come in with clean hands. The defendants admit that they have leased the surface rights of the property and also that they have executed an oil lease with Carter Oil Company. However, counsel for defendants refused to let its witness Bray testify as to how much money they had actually received from the property (p. 20). The defendants steadfastly refused to reveal how much money they had received from Carter Oil Company for the lease until the final argument before the court in June when counsel stated that the amount was \$75,000.00. Certainly on the basis of equity, the defendants have been well repaid for the \$2500 which they loaned on the void mortgage.

Section 18-8-1, U.C.A. 1943 requires every foreign corporation to file certain instruments, articles, by-laws, acceptance of Utah Constitution, "designation of some person residing in said county upon whom all legal process may be served." 18-8-2 requires the filing of "each and every certificate of amendment of its Articles of Incorporation." Section 18-8-5, so far as it is pertinent, reads:

Any foreign corporation doing business within this state and failing to comply with the provisions of section 18-8-1 and 18-8-2 shall not be entitled to the benefit of the laws of this state relating to corporations and shall not sue and shall not take, acquire, or hold title, possession or ownership of property, real, personal or mixed, within this state; and every contract, agreement and transaction whatsoever made or entered into by or on behalf of any

such corporation within this state or to be executed or performed within this state shall be wholly void on behalf of such corporation and its assignees and every person deriving any interest or title therefrom, but shall be valid and enforceable against such corporation, assignee and person;”

In our present matter the very essence of the Van Kleeck operations was the lending of money and the investing in properties for the sake of returns therefrom. The transcript of the deposition of Ross Bray clearly sustains our position that as of the time of the execution of the note and mortgage in 1920 by Joseph Warr and his wife, the Van Kleeck Mortgage Co. had already established in Utah at Vernal an agent for the carrying on of its business. This agent was authorized to and did negotiate and consummate this particular mortgage and carried on for many years thereafter in that capacity. The exact words of Ross Bray in this respect as as follows (p. 15):

“Q. Did you have a field agent out there?

A. We had a local agent in Vernal, Utah, whose name was John Glenn.

Q. Would it be he thru whom these loans were made?

A. You mean the Warr loans?

Q. The Warr loans, yes.

A. Mr. Glenn prepared and forwarded the application to the company for the loan.

Q. Was he at that time authorized to accept applications for the company for loans in that area?

A. Yes, sir."

As this matter arose while the Compiled Laws of Utah 1917 were in force, let us review what our Supreme Court has said on the validity of such a note and mortgage.

Dunn v. Utah Serum Co., 238 Pac. 245. This is an action involving the validity and foreclosing of a mortgage executed by the Utah Serum Co. and a counter-claim and cross-complaint was raised in the litigation. The question came as to whether or not the said company could maintain the said cross-complaint that was filed by the Ft. Dodge Serum Co. This latter company is a corporation organized and existing under the laws of the state of Iowa, which failed and neglected to file copies of its Articles of Incorporation, its By-laws and to appoint a resident agent for some 8 months after the date of the transaction involved in this action. It was not until April 16, 1923 that the said corporation qualified in Utah. The case at page 250 quotes the sections of the Compiled Laws of Utah, 1917 that are pertinent in our present litigation and which are in sum and substance the same as the law now in force, being section 18-8-1, 18-8-2 and 18-8-5 of the U.C.A. 1943.

In this Dunn case our Supreme Court carefully reviewed the previous commitments relative to the matter of the foreign corporation's contracts in Utah and then summarized the law at page 251 as follows:

"The rule to be deduced from the cases cited may be stated thus: Where it is made to appear that any foreign corporation, except an insurance corporation, is doing business within this state within the meaning of section 945, without having complied therewith, every contract whatsoever made or entered into by or on behalf of such corporation within this state, or which is to be executed or performed within this state, is wholly void on behalf of such corporation. This, as I understand it, is the construction of the law which the Court had in mind when speaking upon the subject in the Parker case.

"(4) The doctrine of estoppel cannot be invoked to lift this appellant out of the difficulty in which it finds itself. To hold that Dunn and T. D. Ryan are estopped, because their mortgages recite that they are given subject to this second mortgage, or that Dunn, the two Ryans, and the Utah Serum Company are estopped because they have received the benefits of the money lent and have failed to repay or to return the same, to plead and prove in this action, to which they are parties and wherein their rights are involved, the facts which show that appellant's contracts are void and that it has no right to set them up as the basis of a counterclaim or a cross-complaint would be, in practical effect, to defeat the purpose and intention of the Legislature as manifested in the statute. Such a result cannot be sanctioned by the courts."

A number of authorities are cited in support of this ruling and those that are a variance therewith are distinguished by the Court.

It is apparent that the Van Kleeck Mortgage corporation had launched upon its planned course of business in Utah at

the time the note and mortgage were executed by plaintiffs' parents. It did not qualify in Utah for one year after the date of execution of the note and mortgage.

A recent Utah case construing this matter generally is *Marchant v. National Reserve Company of America*, 103 Utah 530, 137 Pac. (2d) 331. Therein the state and federal cases are discussed at length as to what constitutes "doing business" in this state and holds in essence that a foreign corporation must be engaged in a continuous course of business rather than a few isolated transactions. There must be at least some permanence about the presence and business transactions of the corporation within the state. We submit that the Van Kleeck operation, by its very existence in 1951 as requalified corporations, is evidence enough of the permanence of its activities in Utah, coupled with the provisions of its Articles of Incorporation and its By-laws authorizing it to conduct a mortgage loan business in Colorado and elsewhere and to invest in properties in Colorado and elsewhere. The mortgage at issue was negotiated and consummated through the agency of Mr. Glenn at Vernal, Utah and certainly such were within the scope, course and purpose of the corporation's avowed intent. There is no requirement that we must show a course of conduct in the state prior to this particular mortgage as this was in the line of the purposes of the corporate operations subsequently carried on within the state of Utah. Mr. Bray testified on deposition that the company was actively engaged in business "until about 1930" and "made a considerable number of loans" (p. 9).

This court, therefore, should weigh these matters in de-

termining whether or not in the motion that has been filed to set aside the default there is a substantial or meritorious defense alleged by way of the proposed answer that has been tendered. Another very essential fact to be considered by the court in conjunction with the proposed answer, is the effect of the deed from the Warrs to the Investment Company that has been referred to in the second defense. In this connection let us point out that in the deposition (p. 17) there is a copy of the agreement to reconvey the property back to the Warrs. Our Supreme Court in line with the general rules of law relating to this matter has clearly and without equivocation held that the execution of a deed, apparently full, final and complete on its face, may be shown to be merely a mortgage by evidence, either parol or in writing, of the existence of an agreement to reconvey the property upon the happening of certain events. The primary purpose of such a holding is that sharp dealings such as were engaged in by these two Van Kleeck companies shall not preclude ordinary land owners in Utah from the protection to which they are entitled to in a mortgage transaction, including the right of foreclosure, defense and redemption. The case which established this rule in Utah is *Bybee v. Stuart*, 189 Pac. (2d) 118—Weber County—1948.

“A wararnty deed, absolute in form, was given by Oni Stuart to Claude Stuart. A concurrent agreement was executed providing that Claude Stuart would reconvey upon payment of mortgages and taxes and that he would convey to a purchaser if produced by Oni on like terms. This action is to compel conveyance to such a third party.”

p. 122. "Where there is a written agreement between the parties, contemporaneous with the deed, which shows the deed was given for security purposes, the court will look to the real transaction and treat it as a mortgage." See *Brown v. Skeen*, 89 Utah. 568, 58 P. (2d) 24.

"It is not necessary that an instrument follow the statutory form to be a valid mortgage. In equity, a deed absolute on its face may be shown by parol evidence to have been given for security purposes only. Utah is recognized as a 'lien theory' state. Our Supreme Court has held that a mortgage does not vest title in the mortgagee but merely creates a lien in his favor. Until there is a foreclosure of the mortgage and sale no title vests in the mortgagee. The mortgagor (Oni) retains title to the mortgaged lands and all that is created in favor of the mortgagee is a lien, a right to resort to the lands to satisfy a mortgage debt.

See: *In re Reynolds estate*, 90 Ut. 415, 62 Pac. (2d) 270.

See also: *Whitley v. DeVries et al*, 209 Pac. (2d) 206."

This premise having been definitely established, no force is inherent in the claim of adverse possession that is apparently asserted by the proposed answer. The only legal title in the picture that the defendants could possibly assert is by virtue of the deed in 1921 to the Investment Company. No cash or other consideration was paid by the Investment Company to the Warrs (p. 16). This deed has clearly been shown to be only a mortgage and hence is not the basis for adverse possession and there never has been any step taken for the fore-

closure of the mortgage nor for any sale of the land as required by the law of Utah. Let us consider in addition thereto the very vital factors as to whether there could possibly be any adverse possession by the Investment Company. The testimony of Mr. Ross Bray relative to the payment of taxes, (which we all understand and know to be a vital factor in the element of adverse possession), shows that the taxes were never paid by the Investment Company, but that payment was made only by the Mortgage Company (p. 23) up until 1938, when the Mortgage Company entered into a contract for the sale of the surface rights to Jay Larsen and thereafter neither company has paid any taxes whatsoever. Thereafter, to-wit, on the 4th day of February, 1942, the Investment Company gave its Warranty Deed to said Larsen covering the surface rights, but prior to said date it does not appear that the Investment Company ever exercised any claimed rights or did not act to show that it claimed any right to possession of said property. Another elemental factor in whether or not adverse possession could accrue is the question of whether these foreign corporations doing business in Utah were available for suit by a resident within this state. The records of the county clerk's office show that the last appointment of a resident agent in Utah was in 1926 and none other until 1951. We are advised and can substantiate by evidence the fact that the said resident agent appointed in 1926 left and departed from the state of Utah in 1928 leaving both corporations without resident agents and hence absolutely disqualified to do business in Utah from the period from 1928 to 1951. Of course, no adverse possession could be running in favor of

the non-qualified foreign corporation during the period of its disqualification.

Reference has been made in our affidavit adverse to the proposed motion to set aside the default, to the fact that the corporate existence of both of these corporations that were organized in Colorado has terminated and that no amendments extending the life of said corporations has ever been filed with the County Clerk of Uintah County or with the Secretary of State of Utah. Particularly, the Investment Company is standing upon the asserted title in its name. This corporation was formed in 1901, and for a period of 20 years. Thus, its corporate existence expired in 1921 just a few months after the taking of the purported deed which was in fact only a mortgage. Again no adverse possession could be accruing in favor of this Investment Company in light of its expired existence since 1921.

A reading of the proposed Answer and the numerous purported defenses asserted therein makes it obvious that the Mortgage Company certainly makes no claim whatsoever to an ownership interest in the property at issue now before the Court. We therefore submit that in any event no reversal of the default could be made as to the Mortgage Company because no defense has been asserted on its behalf as to an ownership claim or interest in and to this property. It is obvious that such is not and could not be asserted because of the fact that the abstract of title which was introduced as Exhibit "A" in the original proceedings before this court shows a conveyance, which is referred to in our affidavit now

in file herein, by the Mortgage Company to Joseph F. Warr and his wife, Elizabeth Warr, fully satisfying and discharging the purported mortgages that were claimed to be outstanding and conveying the right, title and interest of the Mortgage Company back to the said Joseph F. Warr and Elizabeth Warr and their heirs and assigns forever.

From the foregoing it appears that the defendants were clearly not entitled to have the default set aside either on the basis of their original motion to set aside the same for surprise, inadvertence or excusable neglect, or on the basis of the motion to reconsider that denial made on May 24th. In this connection the attention of the Court is called to the fact that the motion to reconsider the ruling was not filed until 11 days after the docketing of the denial of the motion. Under the provisions of Rule 52 (b), Utah Rules of Civil Procedure which is the only provision for amendment of findings and judgment that we are able to find, such a motion must be made within 10 days. Therefore, any of the supplemental affidavits submitted in connection with this motion to reconsider, if they had any probative value—which we maintain they have not, should not be considered by the Court for the reason that they were filed after the time provided. The motion to set aside the judgment on the grounds of surprise, inadvertence or excusable neglect was therefore properly denied by the lower court. In fact, the facts are so clear that not only did the lower court not abuse its discretion in refusing to set aside the judgment, but would have abused its discretion had it ordered such judgment set aside.

THE MOTION TO SET ASIDE THE DEFAULT FOR NON-JOINDER OF PARTIES SHOULD BE DENIED.

(a) *The Motion Was Not Timely.*

Rule 60 (b) of the Utah Rules of Civil Procedure provides for the setting aside of judgments on certain stated grounds. This rule provides that the motion must be made within a reasonable time. On certain specific grounds it must be made within three months from the date of the judgment. In this case the default was entered on the 21st of August, 1951 and the judgment complained of was entered on the 31st day of August, 1951. The motion to set aside the judgment for mis-joinder of parties was not filed until the 23rd day of May, 1952. According to their affidavit contained in the file, the defendant companies learned of the entry of judgment early in November of 1951. Thus the defendants waited 9 months after the entry of judgment and 6 months after they learned of the entry of judgment before filing this motion. Certainly this cannot be construed to be a reasonable time and is clearly far in excess of the 3 months allowed under certain designated grounds.

Constructive notice to all parties and interested persons was had by the recording of the Lis Pendens herein on June 27, 1951.

(b) *There Was No Mis-Joinder of Parties.*

The plaintiffs are in agreement with the defendants that

a mis-joinder of parties results where an indispensable party is omitted. However, it is clear from the examination of the facts in this case that neither Jay Larsen nor Carter Oil Company were necessary or indispensable parties to the action. The defendants' position rests wholly upon the faulty premise that there is privity of title in the defendants and Jay Larsen and that any order defeating the defendants' title automatically defeats the title of Jay Larsen. They have stated this position numerous times in their brief as a basis for their various arguments. For example on page 59, it is stated:

"It is, of course, clear in the case at bar that Jay Larsen's title is founded upon the defendants' title. A successful defense by Jay Larsen to the action would necessarily demonstrate that there was no cause of action against the defendants."

Such is certainly not the case. In order to have privity of title not only must two parties claim through the same source, but their title must rest upon the same basis. Jay Larsen claims only the surface rights and the Van Kleecks claim only the oil, gas and mineral rights.. In this case it is true that both the defendants' title and Jay Larsen's title depend upon the deed from the Warrs to Van Kleeck-Bacon Investment Company. Jay Larsen, however, stands in an entirely different position in regard to this deed than do the defendants. The deed was apparently fair on its face and was properly recorded. Its invalidity arose from the existence of an agreement to reconvey, which agreement, as was previously stated, makes an equitably mortgage out of the Investment Company's deed which was fair on its face. Such agreement to reconvey, however, not being recorded would render that deed a mort-

gage only as against the parties having notice of the agreement to reconvey. A bona fide purchaser of the surface rights in good faith for value, which Jay Larsen certainly was, would not be chargeable with any defect in the deed resulting from the unrecorded instrument of which he had no knowledge.

Section 78-1-6, U.C.A., 1943 provides:

“Every conveyance of real estate, and every instrument of writing setting forth an agreement to convey any real estate or whereby any real estate may be affected, to operate as notice to third persons shall be proved or acknowledged and certified in the manner prescribed by this title and recorded in the office of the recorder of the county in which such real estate is situated, but shall be valid and binding between the parties thereto without such proof, acknowledgment, certification or record, and as to all other persons who have had actual notice.”

In this case the deed was recorded, however the agreement to reconvey was not, and so while the agreement to reconvey is binding as between the parties thereto and all who had actual notice, it would not be binding as between the plaintiffs in this action and Jay Larsen.

Jones on Mortgages, Sec. 284, states:

“An absolute deed with a defeasance passes the legal title to the property even in states where it is held that a mortgage in the usual form does not pass the title.”

Therefore, the Van Kleecks, even though the deed is

subject to an unrecorded agreement to recovery, obtained title to the property which they could pass to an innocent purchaser without notice. This exact situation is discussed by Glen on Mortgages, Sec. 10.1, where concerning the rights of a bona fide purchaser, the author states:

“There are many possibilities in this regard, and they are helped out, in our country, by the recording acts, of which we shall say more in a later chapter. Typical for present purposes is the man who purchases land on the faith of a title that, on the face of the record and for all he knows to the contrary, is vested free and clear in his vendor. Such a person as a bona fide purchaser is immune to the suit of a plaintiff who says that when he conveyed, the intention was merely to secure a debt, and there was a defeasance agreement to that effect, which for some reason was not recorded. The defendant as a bona fide purchaser is protected from the claim and the plaintiff must look elsewhere for redress.”

See also *Meehan v. Forrester*, 52 N. Y. 277 and *Mooney v. Byrne*, 57 N.Y. 163.

In the case of *Wiese v. Wiese*, 217 Pac. 994, the Supreme Court of Washington stated:

“If the deed be regarded as a mortgage as between the plaintiffs and the defendants, the sale of the land by the plaintiffs to a bona fide purchaser vested good title in them because of their being innocent purchasers.”

Therefore, although the plaintiffs were entitled to a decree quieting title in them as against any interest in the

property still remaining in the Van Kleeck companies, they would not be entitled to have a decree binding upon any bona fide purchasers to whom the Van Kleecks had conveyed. In this category is Jay Larsen. The plaintiffs were not entitled to and sought no relief as against Jay Larsen.

Section 104-57-12, Utah Code Annotated, 1943, provides in regard to default judgment and quiet title action as follows:

“The judgment shall be conclusive against all the persons named in the summons and complaint who have been served and against all such unknown persons as stated in the complaint and summons who have been served by publication.”

This section clearly recognizes the fact that in quiet title actions there may be individuals having claims to the property who are not named as parties, or who have not been served in the action. Such, however, does not defeat the right of the plaintiff to have the title determined by a default judgment as between himself and the parties properly named and served in the action. There is a vast difference between an action brought to reform an instrument of title and an action to quiet title. An action to reform an instrument of title would, of course, effect the rights of all persons claiming under such instrument of title, and they would be necessary parties. All of the cases cited by the defendants in their brief are cases of this type, as will be hereinafter pointed out. On the other hand, an action to quiet title does not ask for the changing of any instrument of record, but merely asks for the determination of the title as between the plaintiffs and the defendants named and served.

This rule is clearly stated in the Alabama case of *Dake v. Inglis*, 194 So. 673:

“The purpose of the proceeding is not to invest the Court with jurisdiction to sell or dispose of the title to the land, but merely to determine and settle the same as between the complainant and defendants. Therefore, the fact that there are others who might assert claims to the property, who are not made parties, is not an obstacle to a final decree settling the title as between the parties to the bill. The decree is only conclusive against such as are made parties and their privies.”

Similar language is found in the Florida case of *Brooks v. Pryor*, 189 So. 675, where an objection similar to the one in this case was made:

“It is next contested by counsel for appellant that it appears upon the record that interested parties in the subject matter of the litigation were not served with process and should be made parties before a final decree was entered * * * * The answer to this contention is that the bill of complaint is one to quiet title and confirm title in the plaintiffs below and it is not a suit to reform a deed because of a mistake in the description of the lands conveyed.”

The decree in this action casts no cloud upon Jay Larsen's title. The deed from the Warrs to the Van Kleeck companies still stands unchanged upon the records. The decree in this action merely determined that as between the parties to this action, such deed was not a deed absolute, but an equitable mortgage.

Let us examine the cases cited by the defendants in support of their position that the judgment constitutes a cloud on Jay Larsen's title and that he is therefore an indispensable party. The first case cited by the defendants, *Shields v. Barrow*, 17 How. 130, was not a quiet title action at all, but a suit to rescind a contract. Certainly parties to the contract whose rights would have been affected by the rescission were not parties to the action, and the Court therefore held a misjoinder.

United States v. Central Pacific R. Co., 11 Fed. 449, also cited by the defendants was an action to vacate a patent issued by the United States Government. A grantee of the patentee was not made a party and the court held a misjoinder for the reason that a vacating of the patent would leave such grantee without any basis for his title.

As has been pointed out above, there is no effort made in the quiet title action now before the Court to vacate or remove from the record the Warr to Van Kleeck deed through which Jay Larsen claims his title. The same is true of *New Mexico v. Lane*, 243 U. S. 53, where the action seeks to restrain the issuance of a patent, which if not issued would have left keepers title without a basis.

In *South Penn Oil Co. v. Miller*, 175 Fed. 729, there was an action to gain possession of an oil well and dispose of the lease monies thereunder to which monies a person not a party to the action had a claim of right. Obviously in that case the monies could not be property distributed without having all parties before the Court.

United States v. Bean, 253 Fed. 1, held that a purchaser of a tax sale was an indispensable party in an action to annul such tax sale as the annulment of the sale would leave his title without any legal support.

Knickerbocker Ice Co. v. Hofstater, 32 Fed. (2) 184, is a suit to enjoin a trespass and in that case it was held that a prospective purchaser was not a party defendant.

Miller v. Klasner, 140 Pac. 1107, which the defendants say is in point here, is decided on an entirely different point. There it was decided that the defendant named was not a real party in interest, but was merely an agent for Ellen Casey. Furthermore the suit was not one to quiet title, but to restrain the defendant from use of certain water. The Court held that the real party in interest was not the agent who was made defendant, but Ellen Casey, the defendant's principal. This case has no application at all to the case now before the court.

In Vincent Oil Co. v. Gulf Refining Co., 195 Fed. 434, an action was brought to actually annul a lease under which a person not made a party to the action claimed rights. There, had the lease been annulled, this party would have lost all its right and the Court properly held that such a party should be entitled to defend.

Page v. Town of Gallup, 191 Pac. 460, and Egyptian Novaculite Co. v. Stevenson, 8 Fed. (2) 576 (CCA 8), are both cases where an attempt is made by a third party to annul a contract between two parties where only one of the other parties to the contract are made parties to the suit.

Ebell v. Bursinger, 70 Tex. 120, 8 S.W. 77, is an action to cancel a deed on the records, while Iron City Sav. Bank v. Isaacsen, 164 S.E. 520, is a suit for an injunction to prevent the transfer of water stock on the books of a company.

Here we are not making any attempt to upset any record title. The deed from Warrs to Van Kleecks will still remain on the record. So far as the water stock is concerned, that is already in Jay Larsen's name on the books of the company and no action is brought to change this record. Once again we repeat—if Jay Larsen's rights were actually being affected by this judgment then he would perhaps be a necessary party to the suit. Whether or not he is a *permissible* party, in view of the facts of the case, need not be here decided. It may be that had he applied in time, there would be nothing wrong in letting him enter the suit for the purpose of adjudicating his rights. However, in view of the fact that his rights are not adversely affected by the decree, there is no conceivable reason for upsetting the decree as between the plaintiff and defendant for the purpose of merely letting Larsen come into the action.

3

JAY LARSEN SHOULD NOT BE PERMITTED TO INTERVENE.

(a) *His Motion Was Not Timely.*

The first appearance of Jay Larsen in the case was on May 23, 1952 when he filed a motion to set aside the default

and to be permitted to intervene. This occurred some 9 months after the entry of the default judgment. We have already discussed in a preceding section of this brief the question of what is a reasonable time in which to file a motion to set aside a default. The argument made there applies with equal force to the motion of Jay Larsen. If persons desiring to intervene in an action could file a motion to have a judgment set aside and permit them to intervene at any time, there could never be a finality to any judgment. The losing party, in any law suit could always, at any time, upset a judgment by finding a party with some imagined interest in the subject matter of a law suit already determined and have such party file a motion to intervene. Even if Jay Larsen had a right to intervene in this action, which we will hereafter show he has not, he has not acted promptly and his motion should be denied on that ground alone.

(b) His Rights Are Not At Issue In This Action.

At the time of filing the complaint in this action, counsel for the plaintiffs were well aware of the interest of Jay Larsen in the subject matter of this law suit. We knew that he had purchased the surface rights and had paid a consideration therefor. There was nothing to indicate that Jay Larsen had any knowledge of the existence of a reconveyance agreement. It therefore appeared that Jay Larsen was clearly a purchaser for value in good faith under a deed which was in all respects fair on its face. We felt, therefore, that so far as the surface rights and the water stock were concerned, in fact so far as anything that Jay Larsen purported to purchase, his right

thereto was superior to the right of the Warrs. We felt that there was no purpose in joining Jay Larsen in the suit. Our sole purpose in th suit was to try the issue of title as between the Warrs and the Van Kleecks and to quiet title in the Warrs as against the Van Kleecks. The law as it applies to the relative rights of the Warrs and Jay Larsen has been previously discussed. Jay Larsen's title is in exactly the same position as it was before this action was commenced. He has in no way been injured or prejudiced by the entry of the order in this case.

(c) He Has Been Offered and Has Rejected All That He Could Obtain In The Action.

Although it is clear that Jay Larsen has not been injured in this action, in order to emphasize their position in this case and to clear up any possible question as to this matter, during the hearing on the motion the plaintiffs in open court offered to execute to Jay Larsen a quit claim deed to the surface rights of the land and the water stock. At this hearing, Larsen was being represented by the same counsel representing the Van Kleeck companies. Counsel refused to accept this quit claim deed. This action clearly showed that Jay Larsen's appearance in this action is not a genuine and bona fide appearance. He is merely a party manufactured by counsel for the Van Kleeck companies and thrown in the case for the purpose of muddying the waters. If Jay Larsen honestly feels that there is any cloud on his title resulting from the judgment of the plaintiffs, why would he not welcome a deed from the plaintiffs in order to clear up this matter? The answer is

obvious—neither the attorneys for Jay Larsen nor the attorneys for Van Kleeck are one bit interested in the condition of Mr. Larsen's title. They are interested merely in causing confusion in the hope that it will lend weight to their attempt to set aside the default as to the Van Kleeck companies.

As an excuse for refusing to accept the deed, they state that there has been no probate of the Warrs' estate and that there may be persons with intervening interest. Of course, that situation has not been changed at all by the action in this case as none of these intervening interests have been in any way litigated. The only persons that could obtain any interest in the property as a result of the judgment in this law suit are the plaintiffs herein. Any interest which they might have obtained would be returned to Jay Larsen by the quit claim deed. If Jay Larsen were permitted to intervene in the action, he could get nothing more than a determination of his title as between himself and the plaintiffs in this action. The decree could not determine his title as to persons not parties hereto. As all of the persons and the plaintiffs in the action have offered to quit claim to Larsen, he would get everything by a quit claim deed that he could obtain by the most favorable judgment that could be entered in his favor if he were permitted to intervene.

IV

THE POSITION OF CARTER OIL COMPANY.

Carter Oil Company stands in the same position as Jay Larsen. This company took its lease on the property in ques-

tion on the basis of a deed on record which was fair on its face. This lease would therefore, under the authority cited above, take preference over the claims of the plaintiffs in this action. Regardless of what the relative rights of the plaintiffs and defendants in this may be as to the proceeds of such lease, the rights of Carter Oil Company under the lease are not changed by the decree in this case. This would be so even if the plaintiffs had not ratified the lease; however, in view of the fact that plaintiffs have ratified the lease, the Carter Oil Company does not stand to be hurt. The concern of the defendants in this action for the welfare of the Carter Oil Company would seem very amusing. Although Carter Oil Company has from the beginning had full knowledge of the facts of this suit, it has not seen fit to attempt to intervene in defense of its rights. The affidavit of Don Barr (R. 11) clearly shows that Carter Oil Company knew of the judgment on or before November 7, 1951. It also had constructive notice by the recording of the Lis Pendens in June of 1951.

CONCLUSION

The decisions of the Trial Court denying the motion of the defendants should be sustained. The rights of Jay Larsen and Carter Oil Company are not at issue in this case at all. They are merely matters thrown in by the Van Kleeck companies to confuse the issues. The sole questions before this court are—Did the taking of the judgment result from surprise, inadvertence or excusable neglect and if so, have the Van Kleecks a meritorious defense? On the basis of the

authorities above cited, both of these questions must be answered in the negative.

Respectfully submitted,

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